IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7378 OF 2005

M/s. Jogani & Sachdev
Developments. . .. Petitioners.

vs.

Lawrence D'Souza
& Ors. . .. Respondents.

Mr. S. K. Shah i/by M/s. Narayan & Narayan
for petitioners.
Ms. R.C. Nichani for respondents.

CORAM : S.U. KAMDAR, J.
DATE : 15th December, 2005.

ORAL JUDGMENT :

. By the present petition the order dated 9.8.2005 passed by the City Civil Court on a preliminary issue of jurisdiction in L.C. Suit No. 2974 of 2004 is challenged. Some of the material facts of the present case can be briefly set out as under :-

2. The original plaintiffs being respondents herein are the tenants in respect of tenements

situated on a plot of land bearing No. 298, Hissa No. 9 and 15 admeasuring 4961 sq. yards equivalent to 4098 sq. mtrs. at Kole Kalyan, Taluka Andheri in the City of Bombay. The original landlord was one Sheikh Gafoor Sheikh Cassum. By an agreement dated 12.8.1987 entered into by and between Sheikh Gafoor Sheikh Cassum and M/s. Jogani & Sachdev Development the original landlord was selling the said property to the purchaser for the sum of Rs. 1,80,000/-. Under the said agreement for sale dated 12.8.1987 the original landlord also executed a power of attorney in favour of Avtarsingh Sachdev and Ghewarchand Lalchand Jogani inter alia conferring therein a right to develop the said property and/or settle the tenants and obtain sanction and after obtaining sanction of the B.M.C. construct a building on the said plot of land. Pursuant to the said agreement the said purchaser namely, Ghewarchand Lalchand Jogani has issued the rent receipts to the tenants being respondents herein and the respondents have paid the payment of the rent to the said developer for the purpose of said tenements which were in their use, occupation and possession. On 1.3.1992, the petitioner who was the developer and who has entered into an agreement for sale with the original landlord and obtained the power of attorney to collect rent and settle the claim of the tenants for the purpose of redevelopment of the said plot of land entered into

24 agreements with the 24 occupiers of the premises in Goodluck House as agreed that on the respondents-original plaintiffs vacating the said premises and handing over the vacant and peaceful possession of the plot to the petitioner developer, the petitioner will give them in a reconstructed building residential flats of around 324 sq.ft. built-up area with amenities which are stipulated therein. On 8.3.1992 a separate letter was executed by and between the developer and the tenants that the tenants will have an option to acquire ownership right in the new premises but for the purpose of the same the tenants will have to pay the sum of Rs. 5000/- to the developer for the purpose of acquiring ownership right in the said new premises. In any event if the tenants do not wish to exercise the said right then the tenants will be entitled to get the newly constructed premiss on a tenancy basis and not on the ownership basis. On 27.8.1993, the plans of the building were sanctioned. Under the proposal it was provided to construct two buildings on the said plot of land, one building for rehabilitation of the tenants and another building for sale of flats in open market. The plans for both the said buildings were sanctioned on 27.8.1993 and 2.1.1996 respectively. Sometime in or about 2002, the respondents herein filed a writ petition being Writ Petition No. 530 of 2002 against the petitioner and sought a relief that the petitioner should not be

permitted to construct the building as per the sanctioned plan. On 17.10.2003 after completion of the construction, the petitioner obtained an occupation certificate from the Bombay Municipal Corporation in respect of the building which was constructed for rehabilitating the tenants and made an offer to the occupier of the premises to vacate their premises and asked them to shift to the newly constructed building as per the development agreement.

3. In June, 2004, the respondents herein have filed a suit in the City Civil Court being Suit No. 2794 of 2004. The averments made in the plaint inter alia indicate in para 2 that the respondents-plaintiffs admitted that the petitioner is the purchaser of the said property from the original landlord and as the purchaser he has become owner of the said property meaning thereby that petitioner is the landlord of the respondents (original plaintiffs) who have filed the said suit. It has been stated in the plaint that the agreement which has been executed by and between the plaintiffs and the defendant being agreement dated 1.3.1992 is invalid. A declaration is sought that the said agreement is void and unenforceable and not binding on the plaintiffs. Alternatively, the plaintiffs have sought that it should be declared that the said agreement is only valid vis-a-vis one

IOD file and not subsisting vis-a-vis another IOD file. Alternative prayer has an effect that the said agreement dated 1.3.1992 must be performed only as against one IOD file which file was in fact for resale component building and not in respect of the tenancy premises. The remaining prayers in the suit are for interim reliefs. The main prayer on the basis of which the said suit is filed is prayer (a) which reads as under :-

> (a) "That the agreement dated 1/3/1992 executed between the Plaintiffs and the Defendant No. 1 be declared as void and unenforceable and not binding upon the Plaintiffs, or in the alternative, The agreement dated 1/3/1992 be declared as void and unenforceable vis-a-vis IOD file No. CE/065/WS/AH dated 2-1-1996 and valid subsisting and enforceable vis-a-vis IOD file No. CE/913/BSII/AH dated 2/8/1993."

The averments made in the plaint proceed on the footing that the petitioner is the landlord-cum-developer and that he has obtained the agreement dated 1.3.1992 without complying

with various details. It has been contended in para 4 that after entering into the agreement the tenants have come to know that the total area occupied by each of them in the old premises is approximately 362 sq.ft. and not 324 sq. ft. as suggested by the petitioner landlord. It has been further contended that they were not informed that they will be accommodated in the rehabilitation building only and not in the other building. It has been contended that the respondent-plaintiff should be put in possession on payment of Rs. 5,000/- on ownership basis in the first building and not in pending rehabilitation building. The plaintiffs also claim that the agreement dated 1.3.1992 is invalid and the landlord should enter into fresh agreement and thereafter only is he entitled to develop the said property.

4. In the said suit the petitioner-defendant raised an issue of jurisdiction under Section 9A of the Civil Procedure Code. The provisions of Section 9A inter alia provide that the jurisdiction issue must be decided at the threshold and before the interim reliefs are finally granted. Accordingly, the learned trial Court has framed the preliminary issue under Section 9A and has after considering the rival contentions of the parties passed an impugned order dated 9.8.2005. The learned City

Civil Court has after considering the facts come to the conclusion that the City Civil Court has jurisdiction because the suit is only for a mere declaration and as such, the same is not susceptible for monetary evaluation and thus by relying upon Section 6 (iv) (j) of the Bombay Court Fees Act the Court has held that the prayers made are not being capable of monetary evaluation are maintainable by way of a suit for declaration and injunction in City Civil Court at Bombay. The argument was also advanced by the petitioner that in fact the suit is between the landlord and tenants and the said dispute between the landlord and tenants in respect of recovery of possession of the premises would solely lie under Section 33 of the Maharashtra Rent Control Act, 1999 in Small Causes Court at Bombay and, therefore, the Civil Court has no jurisdiction. However,the learned Judge has held that the suit filed by the respondent-plaintiff is not for the possession between the landlord and the tenant but they are only claiming that the agreement is void on the basis of the breaches committed by the defendant no. 1 and, therefore, the suit would lie in the City Civil Court at Mumbai.

5. Being aggrieved by the said order passed by the City Civil Court dated 9.8.2005, the present writ petition has been preferred under

Articles 226 and 277 of the Constitution of India and challenged the said order dated 9.8.2005. The learned counsel appearing for the petitioner has put forth an argument that the City Civil Court has no jurisdiction to entertain and try the present suit. It has been contended that the first part of the prayer clause (a) which seeks declaration that the agreement dated 1.3.1992 is void and thus maintainable would not lie in the City Civil Court at Bombay because it is well settled that format of the prayer or the wording in which the relief is couched is an irrelevant factor but what is required to be seen is the substance of the relief which has been sought if the the reliefs granted. The learned counsel for the petitioner has drawn my attention to the fact that under the agreement dated 1/3/1992 the respondents-plaintiffs are liable to vacate the tenements which are in their occupation in their capacity as tenants in respect of the said property. However, by seeking declaration that the agreement dated 1.3.1992 is not valid and subsisting what is sought by the original plaintiff is to protect their possession. It has ben contended that now it is a settled law that when you are filing the suit for protecting the possession then in that event the suit must lie in the Small Causes Court at Bombay under Section 33 of the Maharashtra Rent Control Act, 1999. It has

been contended that the words 'in relation to the recovery of possession' are wide enough to cover all kinds of possessions including the relief for seeking to protect the possession and, therefore, the City Civil Court has no jurisdiction to entertain and try the suit. It has been contended that the petitioner being the landlord and the respondents being the tenants the requirements of Section 33 of the Maharashtra Rent Control Act, 1999 provide that the suit between the landlord and the tenant and for recovery of possession must lie before the Small Causes Court at Bombay. In support of the aforesaid contention, the learned counsel for the petitioner has relied upon a Division Bench judgment of this Court in the case of Nagin Mansukhlal Dagli v. Haribhai Manibhai Patel reported in AIR 1980 Bombay 123. The learned counsel for the petitioner has also relied upon the judgment of this Court in the case of M/s. Vashdev Prakash vs. Mrs. Vimal Premchand Hinduja and others, reported in 1988 (2) Bom. C.R. 288 and the judgment of the learned Single Judge of this Court in the case of Eknath Vithal Ogale vs. Mansukhlal Dhanraj Jain, reported in 1988 (2) Bom. C.R. 9 and it has been contended that now it is a settled law in so far as this Court is concerned that when the word relating to recovery of possession is used it is of widest amplitude and shall include also the relief which

is sought by way of protecting the property in that prayer. It has been contended that in so far as the question of landlord and tenant is concerned, it is an admitted position that the petitioners are the landlords because of the averments made by the respondent-plaintiff in para 2 of the plaint where it has been contended that the petitioner is a purchaser of the said property and thus owner of the premises and as such the landlord of the said building. In any event, it has been submitted that the petitioners are collecting the rent pursuant to the power of attorney given by the original landlord and ultimately having executed a deed of conveyance in their favour in 2004 by which the petitioners have acquired absolute right in respect of the said property.

6. On the other hand, the learned counsel appearing for the respondent has vehemently contended that the suit in so far as the first part of prayer clause (a) is concerned, is pecuniarily maintainable in the City Civil Court at Bombay and the suit will not lie in the Small Causes Court. It has been contended by the learned counsel for the respondent-plaintiffs that the suit is neither between the landlord and the tenant nor the suit is for recovery of possession. It has been contended that the suit is for mere

declaration to declare that the said agreement dated 1.3.1992 is not valid, subsisting and binding and thus, the City Civil Court has jurisdiction to entertain the suit for a declaratory relief under Section 6 (iv) (j) of the Bombay Court Fees Act and the Court of the Small Causes has no jurisdiction to grant such a declaratory decree.

7. I am unable to accept the contentions of the learned counsel for the respondent-plaintiffs that the suit would not fall under the provisions of Section 33 of the Maharashtra Rent Control Act, 199. It is now well settled by a series of judgments that for considering the jurisdiction of the Court it is not the frame of the suit or the words which are used for seeking a relief are relevant and important but what is relevant and important is the substance of the relief which has been sought. The Apex Court has in the case of Vithoba Bhanji and others, v. Vithal Sakroo and others, reported in AIR 1958 Bom 270 has held in para 39 and 40 as under :-

> (39) In the light of these cases, we have then to see whether the plaintiffs' suit in the present case was one which was exclusively a suit

for a bare declaration that the alienation is not binding upon them, or whether, in essence, it is a suit for any further and better relief. In order to decide this it will be necessary to scan the allegations in the plaint with some care and analyse the substance of the plaintiffs' claim. In order to see the substance of the plaintiff's claim it is not enough for a Court to consider the mere allegations that the plaintiff has chosen to make but the Court must go behind the mere form and verbiage of the plaint and ascertain what indeed is the true relief which the plaintiff is asking for.

(40) Now, as we have said, on the fact of the plaint as it emerged after the several amendments which it underwent, there is no reference whatsoever to any adoption or claim made or relief asked in respect thereof. On the mere verbiage of the plaint, the allegations are that Rukhi (Rukhmabai) and Bapu executed the mortgage of 25-7-1929 in favour of their creditor Dhansing, that Rukhi was under the influence of Bapu &

> all the debts incurred by her were not for legal necessity or for the benefit of the estate of her deceased husband Moti Patil but for the benefit of Bapu under whose influence Rukhi was, and the only relief claimed is that the alienations referred to be declared not binding upon the plff.’s reversioners after the death of Rukhi.

In the case of L. Janakirama Iyer and others vs. Nilakanta Iyer, reported in AIR 1962 SC 633, the Apex Court has held as under :-

> "Therefore, in our opinion, reading the plaint as a whole it would be unreasonable to construe cl. d) in paragraph 35 in the manner suggested by the learned Attorney-General. The prayer which the clause really purports to make is that an administrator should be appointed and that an order should be passed against the respective defendants asking them to deliver possession of the properties to the said administrator. If that be so the plain cannot be construed as one on which a mere claim for declaration is

made. It is a plaint in which a declaration is no doubt claimed but based on the said declaration or adjudication a further claim for possession to the administrator is also made. The result, therefore, is that the argument that the prayer made in the plaint attracts Art. 120 must be rejected.

Though the prayer is couched in declaratory prayers saying that the agreement dated 1.3.1992 is not valid and subsisting but in effect what is sought is the setting aside of the said agreement and consequently protection of the original tenements which are in their possession as tenants thereof and to defeat the right of the petitioner-defendant to operate upon the said agreement and obtain eviction of the original plaintiffs tenants from the suit property and insist upon them to shift in the newly constructed tenements. Thus, in the present case the nature of the relief sought for in part of prayer clause (a) is for retaining possession of tenanted premises. In my opinion, there is no doubt that such a prayer for protection of possession of the premises would fall within the meaning of the words ’in relation to recovery of possession’ and, therefore, the suit between the landlord and

tenant relating to the recovery of possession ought to have been filed under Section 33 of the Maharashtra Rent Control Act, 1999 before the Small Causes Court at Bombay because it has been conferred with an exclusive jurisdiction to try such suit. I am supported in my aforesaid reasoning by the judgment of the Apex Court which has upheld the judgment of the learned Single Judge of this Court which has been cited before me by the petitioner.

8. In the case of Mansukhlal Dhanraj Jain and others. vs. Eknath Vithal Ogale reported in (1995) 2 SCC 665, the Supreme Court has held that the words used 'in relation to recovery of possession' in Section 41 of the Presidency Small Causes Act would be wide enough to cover all the kinds of possession including protection of possession. The relevant portion of the judgment reads as under :

> "16. It is, therefore, obvious that the phrase "relating to recovery of possession" as found in Section 41 (1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit

> property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41 (1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Cause Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits."

In the light of the aforesaid, it is not possible to accept that the prayer sought is not relating to possession of the tenements and, therefore, the suit would not fall within the purview of Section 33 of the Maharashtra Rent Control Act, 1999. However, the learned counsel appearing for the respondents has thereafter contended that even if the suit is related to the recovery of possession, it is not between the landlord and tenant. It has been contended that the petitioner is not landlord. It has been contended that the

petitioner only entered into an agreement for sale on 12.8.1987. It has been contended that the agreement for sale does not create any right, title or interest in the property and thus, the petitioner was not the owner of the property by virtue of the agreement dated 12.8.1987 and, therefore, cannot be treated as landlord of the respondents-plaintiffs and the said Sheikh Gafoor Sheikh Cassum continued to be the landlord of the respondent-plaintiffs tenants. It has been further contended that it is only in 2004 when the petitioner obtained conveyance of the said property from the said Sheikh Gafoor Sheikh Cassum and it is only in 2004, the petitioners become the landlord but the suit has been filed by the petitioner prior in point of time and thus the question of the petitioner becoming a landlord as on the date of the suit would not arise. In my opinion the argument advanced by the petitioner is without any merits. Firstly, for the purpose of ascertaining whether the petitioner is the landlord or not, the averments made by the respondents-plaintiffs in para 2 of the plaint are most relevant. In para 2 of the plaint they have themselves admitted that the petitioner is the purchaser of the property and owner thereof and they have proceeded and filed the suit on the basis that the respondent-plaintiff is the landlord of the building. However, even on merits

I find that there is no substance in the aforesaid contention because it is no doubt true that petitioners entered into mere agreement for sale on 12.8.1987. It is also no doubt true that the agreement for sale does not create any right, title and interest and the deed of conveyance is only executed in 2004. However, in my opinion, the provisions of Section 3 (l) which defines the landlord is a most vital and covers not only the owner of the property but even the rent Collector and also the person who is collecting the rent on behalf of the original owner. It is not disputed before me that the petitioner has been collecting rent pursuant to the agreement for sale and the power of attorney was executed on 12.8.1987. Even the rent receipts which are produced before me by the respondent plaintiff themselves indicate that the rent receipts are issued by the petitioner as the power of attorney holder of the original landlord Sheikh Gafoor Sheikh Cassum. Thus, for the purpose of Section 3 (l) the word 'landlord would take into its sweep the petitioner also even if there is no conveyance in his favour and that he has not become the absolute owner of the said property and that he became the owner only in 2004. Once the petitioner is covered by definition of the word 'landlord' and the respondents-plaintiffs are admittedly the tenants of the said property then the suit would be

between the landlord and the tenants as contemplated under Section 33 of the Maharashtra Rent Control Act, 1999 and thus, the City Civil Court has no jurisdiction to maintain and try the suit. It is only the Small Causes Court at Bombay who has an exclusive jurisdiction to entertain and try such a suit. In that view of the matter, the finding given by the learned trial Court that it is not a suit falling within the scope of section 33 of the Maharashtra Rent Control Act, 1999 because it is not for recovery of possession is ex facie erroneous and is required to be interfered with and the same is liable to be quashed and set aside.

9. The learned counsel for the respondent however, alternatively contended that the suit is not only for the aforesaid prayer but the prayer in the suit also is for alternatively seeking a declaration that the agreement is valid in respect of one IOD which pertains to the resale component and not in respect of the second IOD file which is in respect of the tenants rehabilitation building. It has ben contended that this prayer would definitely not fall within the scope of the Small Causes Court at Bombay under Section 33 of the Maharashtra Rent Control Act, 1999 and, therefore, the City Civil Court at Bombay had jurisdiction at least to entertain the alternate prayer which has

been made by the respondents-plaintiffs before the trial Court. On the other hand, the learned counsel for the petitioners has contended that even the alternative prayer is not maintainable before the City Civil Court at Bombay. It has been contended that though the alternative prayer is couched in a declaratory form but in fact is is a prayer for specific performance of the agreement. It has been contended that when the suit is filed for specific performance the valuation of the property becomes relevant and necessary under the terms and conditions of the agreement and the respondents-plaintiffs are required to pay a sum of Rs. 5,000/- thereunder to the petitioner to become the owner of the new premises whether against one or another IOD files. It has ben contended by the learned counsel for the petitioner that for the purpose of valuation to ascertain pecuniary jurisdiction it is necessary to compute claim of all the plaintiffs together because 15 plaintiffs have filed the suit together. It has been contended that under Order 2 rule 3 it is provided that when the cause of actions are clubbed the jurisdiction of the Court as reference to the suit would depend on the total amount of the claim of all the plaintiffs and the valuation has to be taken into consideration for the purpose of valuation of the suit. Order 2 Rule 3 sub-rule 2 reads as under :-

> "(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

It has been contended that thus a sum of Rs. 5,000/- per plaintiff is taken into account then aggregate valuation of the suit would be Rs. 75,000/- because there are 15 plaintiffs. In that view of the matter, the suit would not lie before the City Civil Court which has monetary jurisdiction only upto Rs, 50,000/-. It has been thus contended that even for the alternate prayer the suit would not lie before the City Civil Court at Bombay and the suit is required to be dismissed. In reply to the aforesaid contention, the learned counsel for the respondents-plaintiffs has replied and contended that the alternate prayer is not for specific performance but is merely for a declaration that the suit agreement is valid in respect of one file of IOD and not in respect of another file of IOD.

10. In my opinion, once again what is necessary to be seen is not the format of the relief but

substantial relief which is sought by claiming that the agreement is valid only in respect of one IOD file. What they are submitting is that the petitioner should perform the agreement vice versa only the resale component building and not against the rehabilitation component of the building. It is thus clear that what is sought by virtue of the prayer in alternative is a flat or premises in a resale component and not against the rehabilitation component. Thus, in my opinion, what is required to be seen is the substantial nature of the relief which is in effect the relief of specific performance and such a relief has to be computed and evaluated on the basis of the aggregate valuation of all 15 agreements which are for Rs. 5,000/- each and thus the City Civil Court would not have jurisdiction even to grant the aforesaid relief. In my opinion, thus, both the reliefs sought in the alternate to each other are not maintainable before the City Civil Court at Bombay and the City Civil Court at Bombay has wrongly come to the conclusion that the relief sought is only of declaratory nature without going into substance of the relief but merely by relying upon the format of relief held that the City Civil Court has jurisdiction to entertain and try the suit. I am of the opinion that it is a settled law that for the purpose of jurisdiction what is required to be seen is not the format of the

relief sought but the substance of the relief. In such an event the City Civil Court has no jurisdiction to grant the relief. Merely by couching the wording of the reliefs, suit cannot be maintained and the court which otherwise has no jurisdiction to grant such relief cannot acquire any jurisdiction to entertain any such suit. In my opinion, therefore, the order passed by the City Civil Court on both the footings is erroneous and totally contrary to the well settled proposition of law and, therefore, requires to be interfered with under Article 226 and 227 of the Constitution of India. In the circumstances the order passed by the trial Court is required to be set aside. I, therefore, set aside the order passed by the trial Court and I dismiss the suit as the City Civil Court at Bombay has no jurisdiction to entertain and try the suit. However, in the facts of the present case, there shall be no order as to costs.

11. The learned counsel appearing for the respondents sates that there is an ad-interim order operating during the pendency of the suit before the city civil Court at Bombay. The said ad-interim order is continued for a period of two weeks from today.